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IN THE

Supreme Court of the United States

October Term, 1963

No. 50

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Statutory Provisions Involved

New York Civil Practice Act (CPA)

"**§588. Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States; or

(b) the action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency, and

(i) one or more justices of the appellate division dissent from its decision; or

(ii) the appellate division direct a reversal or modification of the judgment or order appealed from; • • •"

"§589. **Appeal by permission.** Appeal to the court of appeals by permission lies only

• • •

3. either

• • •

(b) by permission of the court of appeals upon application made directly to that court, from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provision (a) or (b) of subdivision one of section five hundred and eighty-eight of this act."

New York Civil Practice Law and Rules (CPLR)
(Effective September 1, 1963)

"§5601. **Appeals to the court of appeals as of right**

• • •

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and * * *"

"§5602. **Appeals to the court of appeals by permission**

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. In an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or * * *"

"§5611. **When appellate division order deemed final**

"If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it."

Statement

After a final judgment (which resulted from a mistaken default order) was docketed against petitioner, he took an appeal to the Appellate Division, First Department. It unanimously affirmed without opinion. 15 A. D. 2d 458 (Dec. 7, 1961).

Thereafter Mr. Justice Abraham J. Gellinoff

> "Ordered, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant." (R. 4)

Again petitioner appealed to the Appellate Division, First Department. Again it unanimously affirmed without opinion. 17 A. D. 2d 723, 212 N. Y. S. 2d 886 (Sept. 20, 1962) (R. 46).

Petitioner decided to seek further review, and it seemed clear that an appeal lay to the New York Court of Appeals. But in New York this is not the end of the problem, it is only the beginning; for New York's "finality" rule provides generally that only "final orders" are appealable to the Court of Appeals, either (a) as of right, or (b) by leave to appeal to the Court of Appeals. A "non-final" order can be appealed there only by permission of the Appellate Division as a certified question.

Thus, if the Appellate Division's order (unanimously affirming without opinion the order for body execution) was "final", petitioner belonged directly in the Court of Appeals. On the other hand, if it was a "non-final" order, he had to request the Appellate Division to certify a question, a decision wholly within the latter court's discretion.

The usual criteria for distinguishing a "final" from a "non-final" order was whether it was interlocutory and whether something more had to or could be done. Here, the action had long been over, the judgment long ago docketed; another proceeding had been commenced in the form of a motion for a body execution; it had been granted. The sheriff was searching, Gotthilf was on the run, indeed, he left the state, and the Appellate Division affirmed without opinion. Nothing remained except to find Gotthilf and jail him.

To petitioner's counsel, and most of all to petitioner himself, the body execution order represented the ultimate in finality. There was nothing more that could happen either in terms of the action or of petitioner's personal liberty. It was a logical step, then, to appeal directly to the Court of Appeals. In doing so, petitioner made sure to touch all of the procedural bases in the Court of Appeals by (a) docketing an appeal as of right, and also (b) asking that Court for leave to appeal to it—which were the only two ways for a final order to be reviewed there.

Petitioner docketed an appeal as of right in the New York Court of Appeals on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. Petitioner also filed a printed notice of motion for leave to appeal to the Court of Appeals supported by the printed affidavit of counsel and a printed brief. This motion was pursuant to §589, subdivision 3(b) of the Civil Practice Act.

The Court of Appeals dismissed the appeal docketed as of right and dismissed the motion for leave to appeal because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitu-

tion." 12 N. Y. 2d 761, 234 N. Y. S. 2d 714, 186 N. E. 2d 563 (1962) (R. 47); 12 N. Y. 2d 792, 235 N. Y. S. 2d 379, 186 N. E. 2d 811 (1962) (R. 48). By then it was too late to ask the Appellate Division to certify a question.

Despite these rulings, it is the petitioner's position that he did everything he could reasonably be expected to do under available state procedure in order to secure a review by the highest court of the state—unless he was expected to docket appeals in every reviewing court in sight in the hope that he would not miss the right one.

Under any reasonable approach, under the written opinions of the New York Court of Appeals itself, as well as within the meaning of 28 U. S. C. §1257, Mr. Justice Gellinoff's order for body execution against the person of the petitioner was a final judgment. It was as final as any judgment could ever be. If it was a final judgment, then petitioner exhausted his state court remedies by trying to go to the New York Court of Appeals both as of right as well as by motion. If, however, by some quirk Mr. Justice Gellinoff's final order for body execution against petitioner's person is not a final judgment, then he was not entitled to go to the New York Court of Appeals as of right, and he exhausted his state court remedies by going to the Appellate Division, First Department. On either basis, petitioner exhausted his state court remedies.

ARGUMENT

POINT I

The instant writ of certiorari was not improvidently granted.

A. Petitioner has exhausted all remedies available to him under New York law.

Petitioner is astonished that New York's attorney general relies upon the Court's decision in *Gorman* v. *Washington University*, 316 U. S. 98 (1942). There the writ of certiorari was dismissed because the Supreme Court of Missouri had not heard the case, that is, because a judgment had not been "rendered by the highest court of a State in which a decision could be had". 28 U. S. C. §1257 (1958). But *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), makes it abundantly clear that if *Gorman* is in point at all, it supports the Petitioner's position: in the *Local 174* case Mr. Justice Stewart distinguished the *Gorman* case on the following ground:

> As the opinion in *Gorman* pointed out, the Constitution of the State of Missouri expressly conferred the *right* to an *en banc* rehearing by the Supreme Court of Missouri in any case originally decided by a division of the court in which a federal question was involved. It was this provision of the state constitution which was the basis for the conclusion in *Gorman* that the State of Missouri did not regard a decision by a division of the court as the final step in the state appellate process in a case involving a federal question.

Id. at 99. (Emphasis in original.) Turning to the Attorney General's brief, we find the following on page 4:

> But the 1944 constitutional amendments left unaltered the requirement in Art. VI, §7, subd. (4) that appeals from non-final orders could only be taken to the Court of Appeals *by leave of the Appellate Division*, upon a question or questions certified. The section was merely renumbered, and the crucial words are now in Art. VI, §3, subd. (4).

Brief of the Amicus Curiae, p. 4. (Emphasis added.) In other words, under New York law Petitioner does not have a *right* to have the Appellate Division's order considered by the Court of Appeals, but rather only such opportunity for review as the Appellate Division is disposed to grant. Therefore it appears that the procedural posture in which Petitioner presently finds himself corresponds precisely to the one distinguished from the *Gorman* situation by Mr. Justice Stewart in the *Local 174* decision, and that therefore he has exhausted his state remedies within the meaning of this Court's jurisdictional rule.

B. Under the previous opinions of the New York Court of Appeals, the instant order for body execution was a final order, and petitioner exhausted his state court remedies by trying to go to the New York Court of Appeals.

The New York Court of Appeals attached the label of non-finality to numerous interlocutory or intermediate orders, and to cases where something more remained to be done. A reference to the index at the rear of any recent volume of the official New York reports under *Finality of Judgments and Orders* will disclose hundreds of cases, and, as nearly as one can make out, in those designated as non-final something more had to be done. For example,

the latest bound volume of New York reports discloses these instances: *Cioffi* v. *New York*, 11 N. Y. 2d 659, 225 N. Y. S. 2d 737, 180 N. E. 2d 896 (1962) (dismissal of complaint with leave to replead); *Hunter* v. *District Attorney*, 11 N. Y. 2d 663, 225 N. Y. S. 2d 742, 180 N. E. 2d 900 (1962) (denial of motion to assign counsel); *Matter of Schildhaus*, 11 N. Y. 2d 664 (1962) (denial of motion to dismiss petition in disciplinary proceeding against attorney); *Department of Health* v. *Natural Plating Corp.*, 11 N. Y. 2d 674, 225 N. Y. S. 2d 751, 180 N. E. 2d 906 (1962) (granting motion to dismiss complaint with leave to replead); *Erbe* v. *Lincoln Rochester Trust Co.*, 11 N. Y. 2d 754, 226 N. Y. S. 2d 692, 181 N. E. 2d 629 (1962) (denial of motion to dismiss supplemental complaint); *Matter of O'Doherty*, 11 N. Y. 2d 767, 227 N. Y. S. 2d 16, 181 N. E. 2d 761 (1962) (denial of motion for leave to reargue order of disbarment); *Fernekes* v. *CMP Industries*, 11 N. Y. 2d 792, 229 N. Y. S. 2d 33, 181 N. E. 2d 773 (1962) (judgment which declared retirement and profit-sharing program discontinued); *Matter of Dormer*, 11 N. Y. 2d 797, 227 N. Y. S. 2d 37, 181 N. E. 2d 776 (1962) (denial of motion to strike matter from counterclaim); *Rosenstiel* v. *Rosenstiel*, 11 N. Y. 2d 882, 227 N. Y. S. 2d 919, 182 N. E. 2d 407 (1962) (denial of motion for temporary injunction); *Stelzner* v. *First Avenue & Seventeenth Street Corp.*, 11 N. Y. 2d 883, 227 N. Y. S. 2d 920, 182 N. E. 2d 408 (1962) (denial of motion for summary judgment); *Brooklyn Hebrew Home* v. *Ottley*, 11 N. Y. 2d 884, 227 N. Y. S. 2d 920, 182 N. E. 2d 409 (1962) (granting motion by plaintiff for an injunction *pendente lite* and denying cross motion for dismissal of the complaint).

An order for body execution is not interlocutory, it is not intermediate, and once issued nothing more needs to be done.

The New York Court of Appeals handles all so-called "finality" cases that come before it, in two ways: (a) by a short memorandum decision where almost invariably it dismisses the appeal, and (b) occasionally by a decision where it writes an opinion. It is in those rare decisions on finality where an opinion has been written that the clue is found, confirming the thesis that finality is lacking *only* where something more needs to be done.

As long ago as 1876 the New York Court of Appeals said in *Produce Bank* v. *Morton*, 67 N. Y. 199:

> "There was nothing left to be judicially determined * * * The machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case." At 203-4.

Less than a decade later the New York Court of Appeals in *Stimson* v. *Vroman*, 99 N. Y. 74, 1 N. E. 147 (1885), again said:

> "The point is taken on the part of respondents that an appeal to this Court was not authorized because the judgment of the Supreme Court was not final. But it was final so far as it pertained to any judicial action. There was to be no further exercise of judicial discretion." 99 N. Y. at 79, 1 N. E. at 148.

In *Maggi* v. *Sabatini*, 250 N. Y. 296, 165 N. E. 454 (1929), an Appellate Division judgment with reference to the disposition of certain assets in an estate had been denomi-

nated as interlocutory. The Court of Appeals actually *changed* the judgment as to these assets to a "final" one and thus made it appealable.

Percy v. *Huyck*, 252 N. Y. 168, 169 N. E. 127 (1929) involved an appeal from the Appellate Division which had modified an *interlocutory judgment*. Yet it was held appealable and final, under *Maggi, supra,* because the interlocutory judgment directed the immediate delivery of deeds and the assignment of a mortgage. Another "part" of the judgment (for an accounting) was not final.

Where the Appellate Division remitted a matter to the Public Service Commission "to proceed therewith in accordance with the opinion of this court" the Court of Appeals held such an order final if the remission was "merely for the mechanistic process of putting in force the decision of the Appellate Division." But the appeal had to be dismissed if any question of fact or law were still open for consideration or decision by the original tribunal. See, *e.g., New York State Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32, 182 N. E. 237 (1932).

In a fairly recent case, *Matter of Lawyers Mortgage Co.*, 284 N. Y. 325, 31 N. E. 2d 177 (1940), the New York Court of Appeals once again explained finality in ordinary understandable terms, saying:

> "In its challenge to the jurisdiction of this court to entertain the present appeal the respondent fails to distinguish between a proceeding in which some judicial action remains to be taken, and a proceeding * * * where the result of the order which is the subject of appeal may be modified by court action at some later date in an entirely separate proceeding.
>
> * * *

> "Finality in the present proceeding * * * results from the fact that no further judicial action is either directed or contemplated by the order to be reviewed." 284 N. Y. at 331, 332, 31 N. E. 2d at 180.

It might be noted that the above quotation cites as authority Cohen & Karger, *Powers of the New York Court of Appeals*, which the amicus curiae brief of New York's attorney general relies on.

The New York Court of Appeals has also articulated the other side of the coin. For example, in *Matter of Olney*, 281 N. Y. 98, 22 N. E. 2d 252 (1939), it explained:

> "The order does not end the proceeding insofar as appellant is concerned as to any part thereof. It does not irrevocably determine its right, irrevocably change its position * * *. There still remains the necessity of further hearing in the Surrogate's Court." 281 N. Y. at 100.

Or again in *Begent* v. *Noyes*, 284 N. Y. 229, 30 N. E. 485 (1940), involving a license to sell milk, the court stated:

> "* * * it is clear that there is here a remission to the Commissioner for further proceedings, including a further or new hearing on the merits and a determination by him as to the limitations and conditions, if any, to be attached to the licensing of petitioner. The order of the Appellate Division is, therefore, not a final one." 284 N. Y. at 230, 30 N. E. 2d at 486.

From these cases it is clear that whenever the New York Court of Appeals took the trouble to discuss finality in a written opinion, it unequivocally drew a line which fortifies petitioner's position that the body execution order in this case was final. All that one has to do to see the dichotomy that exists is to compare those cases which the

Court of Appeals took as of right or allowed by leave on the one hand, and those that it refused to take. If the order or judgment in question was intermediate or interlocutory, or if something more needed to be done, it was not final.

These were the tests by which the New York Court of Appeals had in the past ruled on questions of finality. *Produce Bank* v. *Morton*, 67 N. Y. 199 (1876) was especially significant in that not unlike body execution, it was concerned with an order, the sole purpose of which was "carrying the judgment into execution," an order the court had regarded as final. The logic of *New York Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32, 182 N. E. 237 (1932) was inescapable; that no question of fact or law remained open for consideration or decision by the original tribunal. Petitioner's counsel had no choice but to appeal directly to the Court of Appeals relying, when he did so, on that court's own rational interpretation of its own precedents.

POINT II

The Appellate Division's affirmance of the body execution order constituted a final order within the meaning of 28 U. S. C. §1257.

The attorney general's second contention is that the Appellate Division's affirmance of Mr. Justice Gellinoff's order does not fall within the scope of the certiorari statute, and that therefore this Court does not have jurisdiction over the controversy at this time. In reply, petitioner argues that regardless of the New York courts' view of the matter, the Appellate Division has handed down a "final

judgment or decree" within the meaning of 28 U. S. C. §1257 (1958).[1]

First, we would urge the rather obvious point that no state court decision is authority on the question of whether a given judicial determination can be reviewed by this Court on certiorari. The answer to that question can be provided only by this Court, in instances where its jurisdiction is challenged in response to a petition for a writ of certiorari or at some subsequent stage in the proceedings. Hence the attorney general's reliance upon cases like *Chase Watch Corp* v. *Heins*, 283 N. Y. 564, 27 N. E. 2d 282 (1940) (mem.) (page 7) and *Rudiger* v. *Coleman*, 206 N. Y. 412, 99 N. E. 1049 (1912) (page 6) adds nothing to his argument. Such cases treat only the Court of Appeals' jurisdiction under New York law; they are exclusively concerned with when *that* court, not this Court, has power to review the orders of a lower tribunal.

Second, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), cited by the attorney general on page 7, makes it clear that the Court has the power to review what has occurred below in the instant case. In *Republic*, Mr. Justice Frankfurter said, for the Court, that

> There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing. 334 U. S. at 68.

---

1. "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States * * *."

Petitioner contends that he "would be irreparably injured if review were unavailing" today. While most cases in which the issue under discussion arises involve judicial determinations made in advance of judgment on the merits, in our case body execution was imposed only after respondent had already prevailed on the litigated points; so that while in the ordinary case the Court can decline jurisdiction safe in the assurance that the federal questions will again be presented on some later occasion, a dismissal of this writ to the Appellate Division will almost certainly result in petitioner's having lost for all time his opportunity to be heard in this Court on the constitutional contentions he has raised. As we showed under Point I, not even the New York Court of Appeals will be able to pass on the constitutional issues unless the Appellate Division agrees to grant an application for leave to appeal upon certified questions.

With all this in mind, we respectfully submit that if petitioner is to receive justice under the Constitution, it must be today or not at all.

POINT III

The constitutional argument made by the *amicus curiae* is without merit.

Point III of the Attorney General's brief argues that Section 764 of the New York Civil Practice Act does not violate either the Eighth or the Fourteenth Amendment to the Constitution. Petitioner will show that the cases the attorney general relies upon lend no weight whatever to his contention.

The case of *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31 (1890), cited on page 10 in support of the notion that "civil arrest is basically a device to punish 'an offence against the court and against the administration of justice'," arose when the defendants violated an injunction against their selling liquor. The District Court imposed on each defendant a fine of $500 and costs and three months' imprisonment, and "this sentence was pronounced by the court as a punishment for *contempt* in refusing to obey * * * [the] writ of injunction * * *." *Id.* at 32. (Emphasis added.) This Court, speaking through Mr. Justice Miller, held as follows:

> "Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution."
>
> *Id.* at 39.

The attorney general has misapprehended the significance of the *Eilenbecker* decision: there the Court merely held that contempt of court may be punished without trial by jury. Whether imprisonment for contempt of court constitutes "civil arrest" at all is highly debatable but in any event the case stands for nothing at all on the question of body execution, simply because imprisonment for debt did not have even the remotest connection to the issues before the Court.

The attorney general's error becomes even more manifest when he directs the Court's attention to *Fisher* v. *Pace*, 336 U. S. 155 (1949), and *Green* v. *United States*, 356 U. S. 165 (1958), as support for the continued vitality of the *Eilenbecker* holding. In the *Fisher* case the petitioner was convicted of contempt in a Texas state court. On certiorari this Court said that "historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question [* * * Fn. 2. *Eilenbecker* v. *District Court* * * *]" *Fisher* v. *Pace*, 336 U. S. 155, 159 (1949). Similarly, in *Green* v. *United States*, the petitioners were convicted of contempt in the United States District Court for the Southern District of New York. In the course of the Court's opinion Mr. Justice Harlan observed that

> "The following are the major opinions of this Court which have discussed the relationship between criminal contempts and jury trial and have concluded or assumed that criminal contempts are not subject to jury trial under Art. III, §2, or the Sixth Amendment * * * *Eilenbecker* v. *District Court of Plymouth County* * * *."
>
> *Green* v. *United States, supra*, at 183, n. 14 (1958).

In short, the attorney general's reference to *Fisher* and *Green* only confirms the evident, namely, that contempt of court is one matter and imprisonment for debt another, and that the *Eilenbecker* decision treats only the former.

All that has been said applies as well to *Matter of Reeves* v. *Crownshield*, 274 N. Y. 74, 8 N. E. 2d 283 (1937), relied upon by the attorney general on pages 8 and 9 of his brief. There the New York Court of Appeals said that

> "The Legislature has seen fit to provide a creditor with a direct remedy for the collection of his just debts.

> A refusal to recognize such an order by the judgment debtor entitles the creditor to move to have him punished for *contempt*. Without this right, there would be no power in the court to enforce its order. To compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply."

Id. at 79, 8 N. E. 2d at 285. (Emphasis added.)

Again, then, the attorney general has chosen a decision dealing with contempt in the hope that somehow it contributes to a discussion of imprisonment for debt. That our present controversy does not in any wise concern itself with contempt of court should hardly have to be mentioned, and petitioner respectfully suggests that the *Eilenbecker*, *Fisher*, *Green*, and *Reeves* decisions are totally inapposite to the issues before the Court today.

Moreover, *Lipman* v. *Goebel*, 357 Ill. 315, 192 N. E. 203 (1934), from which the attorney general quotes on pages 9 and 10, merely construes section 12 of article 2 of the Illinois Constitution, which forbids imprisonment for debt, to exclude judgments rendered in tort actions. Obviously the *Lipman* holding has no bearing on the federal constitutional questions before the Court in the present case, first, because the federal Constitution does not contain a specific prohibition against imprisonment for debt, and second, because in *Lipman* the Supreme Court of Illinois did not even purport to consider imprisonment for debt in the light of the Eighth or the Fourteenth Amendment. And *Harrison* v. *Caudle*, 141 S. C. 407, 139 S. E. 842 (1927), mentioned on page 9, might as well have been relied upon by petitioner, for in that case the court said that

> "The equal protection of the laws guaranteed by the [state] Constitution is not violated where there is a classification which rests upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."
>
> *Id.* at 416, 139 S. E. at 845.

There is a constitutional difference between exempting women from the rigors of body execution and exempting persons on account of financial ability.

Finally, *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917), holds that a statute prescribing body execution does not contravene the Constitution, but the persuasiveness of the decision on the cruel and unusual punishment issue is hardly enhanced by its reference to *Light* v. *Canadian County Bank*, 2 Okla. 543, 37 Pac. 1075 (1894); the *Light* opinion did not even mention the Eighth Amendment ban.

We respectfully contend that the attorney general has failed to cast the slightest doubt upon the validity of petitioner's contentions.

Conclusion

For the reasons expressed above and in petitioner's brief, the judgment below should be vacated as repugnant to the Constitution of the United States.

Respectfully submitted,

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